In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 530

UNITED STATES OF AMERICA, PETITIONER

v.

THE EQUITABLE TRUST COMPANY OF NEW YORK et al.

MEMORANDUM OF PETITIONER IN OPPOSITION TO SUGGESTION OF DIMINUTION OF RECORD AND MOTION FOR CERTIORARI TO CORRECT SAME

Certain of the respondents seek a writ of certiorari directing the Circuit Court of Appeals for the Second Circuit to certify to this Court certain papers, consisting of two classes:

(*a*) The first class is composed of depositions, testimony, exhibits, and briefs which were submitted to, and filed in, the District Court, but which were not incorporated in the printed transcript as filed in the Circuit Court of Appeals or in this Court.

The omission of this material from the printed transcript is easily explained.

On February 19, 1929, counsel representing all of the parties entered into a stipulation in the District Court (R. 359–362) which provided that in addition to certain specified documents, the record on appeal should consist of the following:

> And in addition to the foregoing all depositions, testimony, exhibits, briefs and other papers submitted to and filed in the District Court in the above entitled matter not included in the matters hereinbefore specifically enumerated.

This stipulation was followed by an order (R. 363–367) signed by Circuit Judge Manton, which is dated February 20, 1929, and which provided:

> AND IT IS FURTHER ORDERED that all depositions, testimony, exhibits, briefs, and all other papers included by the stipulation of the parties to this appeal filed in the United States District Court on the 20th day of February, 1929, as constituting the Record on Appeal, *may be omitted from and not printed in the Transcript of Record on appeal* but may be referred to and submitted to the Court upon the argument of the appeal, by any of the parties to the appeal, with the same force and effect as though the same were printed and included in the Transcript of Record herein. (Italics ours.)

At the foot of this order was endorsed a consent to its entry, signed by the solicitors for all the parties hereto and bearing the date February 19, 1929. (R. 367.)

On March 8, 1929, counsel entered into a further stipulation (R. 368–369), which reads:

> IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

The certificate of the clerk of the District Court to the transcript certified to the Circuit Court of Appeals was to the same effect. (R. 370–371.)

It is unnecessary to determine the status of the omitted material either in the Circuit Court of Appeals or in this Court. The important thing is that it did not form a part of the printed record in the Circuit Court of Appeals, and consequently under Paragraph 7 of Rule 38 of this Court does not form a part of the printed record which the Government was required to file here with its petition for certiorari. Paragraph 7 provides that "where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court but only to print such additions as may be necessary to show the proceedings in that court and the opinions there," and that "When the petition is presented it will suffice to furnish ten copies of the record as printed below together with the proceedings and opinion in that court * * *"

The printed records filed by the Government with its petition for certiorari meet all the requirements of the rule.

(*b*) The papers of the second class mentioned in respondents' suggestion and motion are not material upon the question of the timeliness of petitioner's application for certiorari. While it is true that a *decision* was rendered on September 7, 1929, and filed on September 11, 1929, denying respondents' petition for rehearing (Appendix to respondents' suggestion and motion, pp. 4, 6), the actual *order* of denial was dated September 18, 1929 (R. 384), and was filed September 19, 1929. (R. 384; appendix to respondents' suggestion and motion, p 6.) This followed a practice of long standing in the Circuit Court of Appeals for the Second Circuit, as appears from the affidavit of the clerk of that court, a copy of which is attached as an appendix hereto. It is therefore apparent that the *decision* of September 7th upon which respondents rely is tantamount to the opinion which precedes the judgment in a case where no petition for rehearing is filed. In such a case it is clear that the three months' period for filing a petition for certiorari does not begin to run until the judgment is entered (Sec. 8 (a), Act of February 13, 1925), and it is submitted that there is no logical reason why a like rule should not govern in a case such as this where, under the local practice, the order denying a petition for rehearing is made subsequent to the decision that the petition should be denied. *Morse* v. *United States*, 270 U. S. 151, is not authority to the contrary. The

statement in that case (pp. 153–154) that "the time within which the proceeding to review must be initiated begins from the *date of the denial*" of the petition for rehearing must be construed in the light of the cases which the court cites in support thereof. The language used generally in those cases is that the time for review is suspended until the petition for rehearing or motion for a new trial, as the case may be, is "disposed of." Under the practice obtaining in the Second Circuit, we submit that the petition for rehearing is not "disposed of" until the order is made. Cf. *Andrews* v. *Virginian Ry. Company*, 248 U. S. 272.

Respondents further contend that the rule that the filing of a petition for rehearing suspends the running of the period for applying for a writ of certiorari, is only applicable where the petitioner for rehearing is also the petitioner for certiorari. (Brief in opposition, p. 2.) Let us apply that rule to the instant case. The judgment of the Circuit Court of Appeals was entered July 22, 1929. (R. 378.) Under respondents' theory, the Government was required to file its petition for certiorari by October 22, 1929, but the respondents, having filed a petition for rehearing, which was denied in September, 1929, could have filed a cross-petition for certiorari, if they had so desired, in December, 1929. We submit that Congress never intended such a piecemeal review of a judgment.

Although admitting that the "date of the issuance of the mandate is not of itself controlling," respondents contend that the order of September 18, 1929, denying the petition for rehearing was a nullity because the mandate had previously issued, and cite in support of their contention *Peck* v. *Sanderson*, 18 How. 42. (Brief in opposition, p. 5.) In that case the rehearing was sought at a term subsequent to that at which the judgment was entered and the mandate issued. It is well settled that after the term has ended all final judgments of a court pass beyond its control unless appropriate steps to set aside, modify, or correct them have been taken during the term. *Bronson* v. *Schulten*, 104 U. S. 410, 415. In the instant case the judgment of the Circuit Court of Appeals was entered on July 22, 1929, during the "October Term, 1928" of that court. (R. 372, 378.) On the same day the court extended the time within which respondents could file a petition for rehearing until August 15, 1929. (Appendix to respondents' suggestion and motion, pp. 7–8.) The petition for rehearing was filed on August 12, 1929. (Appendix to respondents' suggestion and motion, p. 5.) *Peck* v. *Sanderson*, *supra*, is obviously not in point.

The Government's petition for writ of certiorari was filed in this Court on December 18, 1929, which was within three months of the order dated September 18th denying the petition for rehearing. The petition for certiorari was, we submit,

filed within the period prescribed by Section 8 (a) of the Act of February 13, 1925.

The motion should be denied.

Respectfully submitted.

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NAT M. LACY,
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JANUARY, 1930.

APPENDIX

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify as follows:

In December, 1928, general rules of the United States Circuit Court of Appeals for the Second Circuit were promulgated. Rule 29 of those general rules is, in part, as follows:

> Upon the filing of any decision by this court the clerk shall forthwith, or at any later time, if the court thinks justice requires it, enter the proper order, and will thereupon prepare and tax the bill of costs, giving to the parties reasonable time to file with him their proposed orders and bills of costs, with proof of service of the same upon their opponents.

A similar rule in the exact language above quoted, or in substantially similar language, has been in effect in this court since 1918.

Pursuant to this rule or its antecedents, it has been the uniform practice in this court since 1918 for the Clerk to enter an order upon any decision of the court, including a decision denying a petition for rehearing, approximately one week after the filing thereof.

Dated, New York, January 8, 1930.

[SEAL.] WM. PARKIN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1930